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December 5, 2011

Ms. Cynthia T. Brown, Chief
Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington. DC 20423

By Messenger

Re: Docket No. 42119
North America Freight Car Association v. Union Pacific Railroad Co.

Dear Ms. Brown:

Enclosed for filing are a signed original and 10 copies of the Public Version of Opening Statement of Complainant, North America Freight Car Association. Please note that Exhibit 4 has been deliberately omitted.

Kindly use the additional copy to show receipt of this filing and return it with our messenger.

Respectfully submitted,

Andrew P. Goldstein
Attorney for
North America Freight Car Association

PUBLIC VERSION

ORIGINAL

BEFORE THE

SURFACE TRANSPORTATION BOARD

DOCKET NO. 42119

NORTH AMERICA FREIGHT CAR ASSOCIATION

v.

UNION PACIFIC RAILROAD COMPANY

OPENING STATEMENT OF FACT AND ARGUMENT ON BEHALF OF COMPLAINANT NORTH AMERICA FREIGHT CAR ASSOCIATION

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Dated: December 5, 2011

I. PREFACE

This case involves novel issues underlying the ultimate legal question of whether the provisions of Tariff UP 6004-C, Item 200-B (the "tariff provisions"). which essentially transfer from Union Pacific Railroad Company ("UP" or "Union Pacific") to shippers all responsibility for outer car cleanliness and "safe" outer car conditions, including freedom from lading residue, constitute one or more unreasonable practices.

The tariff provisions in question impose "surcharges," or penalties, and significant additional costs on shippers for switching "unsafe" cars that have been accepted into transportation by defendant UP. whether or not UP has inspected the cars for "unsafe" exterior car conditions, as required by Federal Railroad Administration ("FRA") regulations. The UP tariff places the onus on an origin shipper to clean lading residue from empty cars even if UP does not inspect or stop a "dirty" car not in compliance with FRA rules after the car has been unloaded by a prior consignee, or inspects the car ineffectually and fails to take steps to remove exterior residue before placing the car for loading. UP's tariff also places responsibility on the shipper for the consequences of lading residue on wheels and other car parts after the car has been loaded and either not inspected by UP or inspected with approval, and placed in transportation service by UP.

The tariff provisions are unreasonable in that they transfer UP's own obligation to provide clean and safe cars suitable for transportation to its shippers and impose penalties and costs on shippers whether or not UP has inspected and approved the cars as "safe" for transportation.

II. BACKGROUND

North America Freight Car Association ("NAFCA" or "Complainant") is an unincorporated association comprised of companies that manufacture, lease, rent, own, or operate private

freight cars. The members of NAFCA own or operate over 500,000 private freight cars and utilize railroad owned freight cars that move from time to time over the lines of Union Pacific.

Union Pacific is a Class I railroad subject to the Board's jurisdiction with extensive trackage throughout the western United States. Its lines are used by NAFCA shipper members for the movement of private cars and railroad-owned equipment, in both cases principally utilizing covered hopper cars and tank cars.

On October 22, 2008, UP issued Item 200-A of Freight Tariff 6004, entitled "EXTERIOR RAILCAR CONTAMINATION." Its provisions provided, *inter alia*, that any party releasing a loaded or empty car to UP was solely responsible for insuring that the rail car wheels and all safety appliances were clean, with no commodity residue, and that all valves and discharge ports were properly secured and sealed. If UP personnel discovered that the railcar had any of the above "contamination, leakage, or unsafe conditions," the tariff provided that the car would be returned to the loading or unloading facility or stopped enroute and the responsible party could be assessed a $650 surcharge and would pay for switching and related handling or storage charges. In addition, paragraph (a) of Item 200-A required the party releasing the railcar to indemnify and hold UP harmless from all costs associated with any spill resulting from failure to comply with Item 200-A.

In response to Item 200-A, NAFCA filed a complaint with the Board alleging that the Item imposed unclear standards and unfair responsibilities on a consignor because UP did not undertake to furnish an empty car for loading free of "contaminating conditions," and that UP apparently was failing to observe the regulations of the FRA directing railroads to conduct a pre-departure inspection of cars for defects, including any "apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination." Item 200-A used the term "safe

condition" to describe how a shipper was required to maintain cars. The complaint alleged that the provisions of Item 200-A constituted one or more unreasonable practices in violation of 49 U.S.C. Section 10702; unreasonable car service rules and practices in violation of Section 11121; and violated a carrier's duty to furnish safe and clean cars for transportation, in derogation of Sections 10101 and 11121. Additionally. the complaint alleged that the indemnification provisions in the Item were an unreasonable practice in violation of Section 10702.

After UP filed its answer to the initial complaint, the parties were granted permission by the Board to engage in negotiations while the proceeding was held in abeyance. The parties held numerous meetings, discussions and email exchanges in an effort to resolve their differences, but without success. On June 29, 2011, UP issued the Amended Tariff Item 200-B, which is the provision presently challenged by NAFCA in the First Amended Complaint. Item 200-B does not represent any agreement between the parties and is solely UP's unilateral offering of a revised version of Item 200-A.

III. ITEM 200-B

Item 200-B, attached as Exhibit 1 hereto, is essentially a rewrite of Item 200-A, with the exception that the indemnity clause in paragraph (a) of Item 200-A does not appear in Item 200-B.

Item 200-B, paragraph (1), entitled "Tendering Cars Safe for Movement," makes it the duty of a consignor or consignee releasing a loaded or empty rail car for movement on UP to remove all lading residue from the car's exterior, "including the wheels, brakes, and safety appliances ... and insure that all valves and discharge ports are properly secured and, if necessary, sealed to prevent leakage during rail movement before tendering the car for movement." If UP

rejects the car upon release by a consignor or consignee, it may access a $650 per car surcharge (Item 200-B, ¶ 1).

Paragraph 2 of Item 200-B, entitled "Setting Out Unsafe Cars at Origin or Destination," provides that if UP "discovers that the rail car is in an unsafe condition for movement due to the failure to remove lading residue or to properly secure (and seal, if necessary) ... while still within the facility where it was loaded or unloaded," UP may assess a $650 surcharge (or, as NAFCA sees it, a fine), plus an intraplant switch charge. These switch charges amount to $180 per car. See Exhibit 2, Verified Statement of Gary J. Devlin.

UP does not acknowledge in paragraph (1) or (2) that it has a duty to inspect cars for lading residue or proper securing, but states that it may act to impose "surcharges" if it "discovers" impediments as described in the tariff. Discovery can occur accidently, or deliberately. As discussed in more detail below, UP has a duty under FRA regulations to affirmatively seek out "unsafe" conditions, but its tariff fails to acknowledge that duty.

Under Paragraph (3) of Item 200-B, entitled "Setting Out Unsafe Cars Enroute" if UP "discovers that the rail car is in an unsafe condition for movement due to the failure to remove residue or properly secure ... after the car was removed from the facility where it was loaded or unloaded," UP will set out the car and the party responsible for releasing it will, at its own cost, return the car to a "clean and safe condition" and dispose of residue or debris. UP may assess that party a $650 surcharge or penalty, plus switch charges.

Finally, Paragraph (4) of Item 200-B purports to make the consignor or consignee responsible –

> for any property damage, cost associated with environmental contamination and cleanup, personal injury, or death attributable to lading leakage or lading residue on the exterior of rail cars, including wheels, brakes, and safety appliances. UP's acceptance of a

> rail car that is later determined to be leaking *or to have lading residue on its exterior* will in no way relieve the consignor, consignee, or agent of its obligations herein, and shall not constitute a waiver by UP of the consignor's, consignee's, or agent's obligations to tender rail cars suitable for save movement. (Emphasis added.)

Paragraph (4) of Item 200-B, and its last sentence in particular, is a telltale provision. It provides, in essence, that, even if UP accepts a car for transportation, finding it to be in "safe" condition, UP nevertheless reserves the right to assert liability against the shipper for failure "to tender railcars suitable for safe movement." The implication of this sentence, which is to impose absolute liability on a consignor, goes to the core of this case, as explained below.

IV. FRA REGULATIONS

This case is one of several in recent years in which shippers have challenged tariffs published by railroads that require shippers and receivers to absorb costs, burdens and risks formerly borne by railroads.[1] There has been a marked rise in efforts by rail carriers to lower their costs and risks by shifting obligations to their customers, and a concomitant increase in unreasonable practice cases before the Board.

NAFCA submits that the challenged tariff is inherently objectionable, given the ability of UP itself to guard against unsafe car conditions and given UP's egregious attempt to disclaim any liability of its own, even if it is negligent. The unreasonableness is compounded, however, where UP's tariff change flouts regulations promulgated by the Federal Railway Administration that directly address the issue presented here, in 49 C.F.R. Part 215.[2] Specifically, 49 C.F.R. 215.13(a) provides:

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[1] See, e.g., *Ag Processing – Petition for Declaratory Order*, Docket No. 35387 (snow and ice on cars); *Arkansas Electric Cooperative Ass'n*, Docket No. 35305 (coal dust mitigation); *NAFCA v BNSF*, Docket No. 42060 (Sub-No. 1) (storage charges on empty private cars); *Union Pacific Railroad Co. – Petition for Declaratory Order*, Docket No. 35219 (obligation to transport hazardous materials).

[2] All pertinent FRA regulations cited herein are attached as Exhibit 3.

> (a) At each location where a freight car is placed in a train, the freight car shall be inspected before the train departs. This inspection may be made before or after the car is placed in the train.

There are two types of car inspectors. 49 C.F.R. 215.11, titled "Designated Inspectors," states that each railroad shall designate persons qualified to inspect freight cars who "shall have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the requirements of [49 C.F.R. Part 215]." Individuals with the degree of competence contemplated by Section 215.11 were employed by railroads as carmen and were stationed not only at large yards, but at smaller yards as well. Upon information and belief, far fewer carmen work for Union Pacific today than in former years, and those that remain are stationed almost exclusively at large freight handling facilities, such as classification yards, rather than at individual car origination facilities of shippers.

However, 49 C.F.R. 215.13(c) provides that, "[a]t a location where a person designated under § 215.11 is not on duty for the purpose of inspecting freight cars, the inspection required by paragraph (a) shall, as a minimum, be made for those conditions set forth in appendix D to this part." Upon information and belief, most of the cars released to UP for transportation are at points where a person designated under § 215.11 is not on duty.

Appendix D states:

> At each location where a freight car is placed in a train and a person designated under § 215.11 is not on duty for the purpose of inspecting freight cars, the freight car shall, as a minimum, be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination. These conditions are readily discoverable by a train crew member in the course of a customary inspection.

There follows a list of enumerated conditions "that are likely to cause an accident or casualty." The list includes –

1.(g). Broken or missing safety appliance

1.(h). Lading leaking from a placarded hazardous material

4. Broken or extensively cracked wheel

6. Any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination.

V. THE RELATIONSHIP BETWEEN ITEM 200-B AND 49 C.F.R. PART 215

Item 200-B reiterates on several occasions that UP's goal is to curtail the movement of "unsafe" cars. See, e.g., Item 200-B, ¶ 1 Title, ¶ 2 Title, ¶ 3 Title, Paragraph 1. last sentence.

Although Item 200-B purports to place the onus on the "[c]onsignor, consignee ... releasing a loaded or empty rail car for movement on UP's lines [to] remove lading residue on the rail car's exterior, including the wheels, brakes, and safety appliances ... and insure that all valves and discharge ports are properly secured and, if necessary sealed," UP appears nevertheless to recognize that the legal obligations emanating from the FRA's freight car rules are applicable to UP, as a railroad, and not to shippers or consignees. Thus,

> UP states that, in addition to inspecting for broken or cracked wheels and for over-heated wheels in the course of a customary inspection, UP's train crews are directed to inspect for any other apparent safety hazard that is likely to cause an accident or casualty, in accordance with FRA regulations.

UP Answer to Complainant's Interrogatory No. 4.

UP not only claims that it directs its crews to inspect all cars in accordance with the FRA regulations cited above, but also states that "it is not aware of situations in which railcars move in a train without receiving an inspection" under 49 C.F.R. § 215.13. UP Answer to Complainant's Interrogatory No. 1.

Given the requirements of 49 C.F.R. Part 215 and UP's claims that every car it receives from a consignor should be inspected "before the train departs" (49 C.F.R. § 215.13), UP has in effect asserted that it tries to inspect each car for any "hazardous conditions ... likely to cause an accident or casualty before the train arrives at its destination," including any "apparent safety hazard" (49 C.F.R. Part 215, App. D). Inasmuch as Item 200-B classifies "lading residue" on a car's wheels as a condition that may make a car unsafe for movement, and because 49 C.F.R. Part 215, App. D(2)(6), requires UP to inspect for any "apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination," UP itself is required to make pre-departure inspections of freight cars for lading residue on the wheels (and other car parts as enumerated in Appendix D) before each train departs.

This conclusion is bolstered by the indisputable fact that UP is required by Appendix D to make a pre-departure inspection of each car for cracked or broken wheels, and it cannot seriously be contended that an inspection of a car for a cracked or broken wheel would not disclose any lading residue that happened to be on the wheel. Safety is important to all parties, but if it is paramount to UP, it can easily inspect wheels for "unsafe" product residue when it conducts mandatory pre-departure inspections. If UP is either not making the FRA-required wheel inspections it claims to be its directed practice,[3] or is making those inspections and finding no lading residue on the wheels, the Board should conclude that UP assumes full responsibility for the consequences of its actions, which are described below, and that Item 200-B is unreasonable to the extent it imposes absolute liability on shippers regardless of UP's actions.

[3] The Board should note from UP's above-quoted response to NAFCA's Interrogatory No. 4 that UP carefully avoids asserting that it does, in fact, make a pre-departure inspection of each car, and states only that its "crews are directed to inspect."

VI. ARGUMENT

A. Unreasonable Practices in General.

When, as here, a complaint invokes the STB's unreasonable practice jurisdiction, there is no quantitative yardstick for measuring what is unreasonable. As the Board recently held:

> Whether a particular practice is unreasonable depends on the facts and circumstances of the case. The Board gauges the reasonableness of a practice by analyzing what views as the most appropriate factors.

Finance Docket No. 35305, *Arkansas Electric Cooperative Corp. – Petition for Declaratory Order* (March 3, 2011 at 5). *See, also, Granite State Concrete Co. v. STB*, 417 F. 3rd 85, 92 (1st Cir. 2005, noting that the Board has "broad discretion to conduct case-by-case fact specific inquiries ... in the wide variety of actual circumstances encountered." The Board and reviewing courts recognize that unreasonable practice jurisdiction under 49 U.S.C. § 10702 is broad because there are many ways railroads may act unreasonably.

Whether UP in some instances skips the inspection of cars before placing them in a train at a shipper's facility or actually inspects them, as it should, it is either declaring, on the one hand, the cars safe for transportation when placed in a train or, on the other, forfeiting its ability to argue that the cars were not safe for transportation when placed in a train by UP. It is unreasonable for UP to shift the burden to shippers of making sure cars are safe for transportation if it does not inspect the cars or does inspect them and accepts them for transportation.

NAFCA fully expects UP to try to draw an analogy between this case and the Board's March 3, 2011 decision in *Arkansas Electric Cooperative Corporation, supra*, involving a BNSF tariff requiring shippers to mitigate coal dust lost from the tops of open-top hopper cars in transit. Any such attempt must be rejected, for several reasons.

The Board found that BNSF had gone too far in its efforts to control coal dust, and the challenged tariff was found to constitute an unreasonable practice, in part for failing to provide a reasonable "safe harbor," i.e., reasonable steps shippers could take to avoid exposure to liability.

Here, in contrast, UP has not established, either through its own data or through citation to FRA research, that there is a serious problem with unclean car exteriors. Since 2008, when Item 200-A was first published, UP has apparently had no occasion to impose any surcharges on any shippers, but the challenged UP tariff encompasses all shippers and receivers of all commodities, and is thus not narrowly tailored. Since 2008, there have been a total of just 15 incidents reported by FRA of cars exiting retarders at excess speeds allegedly due to foreign matter on the wheels. See *infra*.

Another major factor differentiating this case from the BNSF coal dust case is the fact that FRA regulations make UP, and not consignors and consignees, primarily responsible for inspecting cars and making sure they are safe or else ordering them out of service until they are made safe. UP is, of course, the party in the best position to assume these responsibilities in any event, but the existence of the FRA regulations makes it unnecessary for the Board to decide which party is best positioned, and under what circumstances, to perform various inspection functions.

The main relevance of the coal dust decision here is its support for the *unreasonableness* of UP's tariff, because of the absence of (a) a demonstrated significant "dirty car" hazard, (b) a narrowly tailored remedy, and (c) a safe harbor.

More relevant here are earlier decisions in which FRA regulations were relied on. In the radioactive materials cases, the railroads first attempted to "flag out" of transporting spent nuclear fuel, by modifying their tariffs to eliminate any holding out as to such service. When that at-

tempt was rejected by the ICC, the railroads tried to require costly special train service for cask cars. In affirming the agency's rejection of that requirement, the D.C. Circuit noted that DOT and the Nuclear Regulatory Commission had established applicable safety standards, and held:

> The ICC therefore properly defers to the expertise and primary jurisdiction of the NRC and DOT both in determining whether particular measures are reasonably required to produce the necessary level of safety, and in deciding whether any particular safety measure will likely produce benefits commensurate with its cost and will be economical.

Consolidated Rail Corp. v. ICC, 646 F.2d 642, 650 (D.C. Cir. 1980), cert. denied 454 U.S. 1047 (1981).

NAFCA recognizes that the Board has its own role to play with respect to rail safety, as the Board itself confirmed recently in *Railroad Ventures, Inc. – Abandonment Exemption*, STB Docket No. AB 556 (Sub-No. 2X, served April 28, 2008), 2008 WL 1855929 (S.T.B.). In that proceeding, the rail carrier sought to avoid an adverse outcome by arguing that the STB was intruding on the primary jurisdiction of the FRA. The Board rejected that argument, stating (slip opinion at 9-10):

> Our decision here simply finds that RVI, as a common carrier, had a duty to maintain its rail line in accordance with the rules and regulations of the FRA, and it failed to do so. The Board has the authority and the responsibility to enforce RVI's obligations as a common carrier under the Interstate Commerce Act separate and apart from any obligation or regulation of the FRA.

To the extent that there is a failure to comply, the Board should require compliance and should reject as an unreasonable practice UP's attempt to shift the costs, burdens and risks of compliance to customers.

Even if Union Pacific in the future were to find a car unsafe at origin and assess a surcharge pursuant to its tariff, the tariff is unreasonable due to the last sentence of Item 200-B(4).

There, UP takes the position that, even if it inspects a car at origin, assessing no surcharge because there is no basis for it to do so, UP reserves the right to later claim that the same car was "unsafe" at origin. Some would call that trying to have your cake and eat it, too. But UP's tariff provisions are more than just distasteful. They represent an effort to displace the laws of negligence under which UP could be liable for contributory or proportional negligence, and forfeit some or all of its claim on that basis. *Boston & M. R.R. v Sargent*, 57 A. 688 (N.H. 1904); *LaFreniere v. Indiana Harbor Belt RR*, 2001 WL 881367 (U.S.D.C. N.D. Ill., 2001). Here, UP is attempting to take advantage of its ability to publish a tariff that places UP in an advantageous position that it could not attain as a matter of law were the tariff provisions not in existence. If UP had to pursue its rights, if any, under civil or common law, UP's own negligent acts would preclude its attempt to force shippers to bear such liability. There is absolutely no reason why the civil law of negligence will not suffice to resolve disputes regarding allegedly "contaminated" cars.[4]

The same principles apply to other aspects of Item 200-B. UP has expressed great concern about the allegedly unsafe conditions that arise when there is lading residue on car wheels that "contaminate" the retarders in classifications yards so that the retarders do not grip car wheels fully and allow cars to exit the retarders at excessive speeds that may lead to equipment collisions. But the fact is that UP does little to fend off these events. Its actions in failing to stop a single car at an origin point for having wheels that are "unsafe" and allowing all such cars to pass inspection, means that such cars presumptively start out in safe condition while in the possession of UP. If some event occurs enroute that causes product residue to adhere to the wheels of a car and the wheels in that condition "contaminate" a retarder, it should not be assumed that

[4] It is well-established in the case law that attempts by a party, through contracts of adhesion or otherwise, to force other parties to accept liability for the first party's negligence are void as against public policy.

the consignor is the solely responsible party for the contamination. While there may be instances in which product leaks from a car enroute, it does not follow automatically that the leakage has found its way to a wheel. Further, when that car reaches a classification yard it is available for inspection by UP, and any product residue on the wheels can be removed by the agent of the consignor or consignee if the condition of the wheel is called to their attention, or can be removed by UP itself. UP has already identified certain commodities that have a disclosed tendency to "contaminate" wheels.[5] UP can and should take particular steps to inspect those cars before they have an opportunity to foul retarders.

[redacted] Proper wheel inspections by UP would disclose "contamination" before, and not after, the retarder process begins. Even when UP identifies a car as having exited a retarder at an excessive speed and deduces from an examination of the wheels on that car that there was a "contaminant" on the retarder, [redacted] where its wheels may contaminate yet another set of retarders in another classification yard enroute.[6]

[5] See Exhibit 5, an UP internal email, which identifies sugar, soy oil, potato products, tallow and tar as commodity groups that UP believes have a tendency to foul retarders.

[6] "B/O" is an abbreviation used on UP's emails for "Bad Order." "SN" is an abbreviation used by UP for "Shipper Negligence."

Item 200-B is unreasonable in that it ignores each and every negligent action or inaction by UP. It allows UP to avoid duties, responsibilities, and legal defenses available to a defendant at civil law in any suit where UP might seek to recover damages from a shipper due to a claim that product residue on car wheels caused an accident.

B. Unreasonable Shifting of UP's Burdens.

Item 200-B(1) purports to make it the duty of a consignee, consignor, or agent releasing a loaded or empty railcar for movement on UP's lines to "remove lading residue from the railcar's exterior, including the wheels ... and insure that all valves and discharge ports are properly secured and, if necessary, sealed to prevent leakage during rail movement before tendering the car for movement." A $650 per car surcharge is provided if "UP rejects the car as unsafe for movement."

The Board has rejected the concept embraced in Item 220-B(1) by stating: "The duty under 49 U.S.C. 11121 to provide safe and clean cars is on the carrier." *Liability for Contaminated Covered Hopper Cars,* 10 I.C.C. 2nd 154. 1994 WL 236270 (ICC) (May 31, 1994). Although that case involved contamination of the interior of covered hopper cars, the governing principle is the same because it would make no sense to hold that a carrier must provide "safe and clean cars" on the interior, but may impose any type of "unsafe" or "unclean" car exterior on its customers, and then make them responsible by tariff for cleaning those cars. If UP is tendered an unclean or unsafe empty car by a consignee for movement to a loading point, UP cannot escape its duty under *Contaminated Covered Hopper Cars* and Section 11121 to insure that the car is safe and clean when tendered to the next consignor for transportation, and certainly cannot impose penalties on a consignor because the shipper does not clean cars where UP failed to do so itself.

Item 200-B(2) provides that if "UP discovers that the rail car is in an unsafe condition for movement due to the failure to remove lading residue or to properly secure (and seal, if necessary) after the car was switched from the spot where it was tendered but while still within the facility where it was loaded or unloaded, UP will remove the car from the train and set it out ... to clean, secure or seal, as necessary." Paragraph (2) also provides that UP may assess a $650 surcharge per car set out for cleaning, securing or sealing and assess applicable intraplant switch charges. Those switch charges amount to an additional $180 per car. Exhibit 2.

Scrutinized carefully, Item 200-B(2) imposes no duty on UP to affirmatively seek to identify an "unsafe condition for movement due to the failure to remove lading residue." Instead, UP imposes on itself the much more ambiguous and optional duty to "discover" railcars in unsafe condition due to lading residue. Complainants believe that UP has chosen the ambiguous verb "discover," which might be construed to mean finding by accident, happenstance, or post-problematic deduction, unsafe conditions for which UP should be affirmatively examining cars tendered for transportation at origin. Item 200-B(2) contains no commitment on the part of UP to provide clean or safe empty cars for transportation but instead places that duty on the shipper.

Union Pacific has made it clear to members of NAFCA, including those who are submitting verified statements herewith, that UP regards accumulations of lading residue on car wheels as UP's primary concern with lading residue. It is not clear to NAFCA why, in the face of FRA regulations posing very substantial fines on shippers whose cars are improperly sealed or leaking product, such as ethanol,[7] UP states "that Item 200-B is intended to promote safe and efficient rail transportation and to reduce risks to public health and safety." Answer of UP to First Amended Formal Complaint, ¶ 1. Plainly, the FRA fines serve that purpose. UP gives no hint in its statement of Item 200-B purposes that its $650 "surcharge" is a cost recovery measure or any-

[7] See 49 C.F.R. Pt. 209.

thing other than a step "to promote safe and efficient rail transportation." As such, it is unnecessarily and unreasonably duplicative of the penalties imposed by FRA for loosely bolted or leaking tank cars.

According to UP, safety problems arise at classification yards because cars that enter the classification process, which includes the use of retarders[8] to slow the movement of the cars on the downhill side of the classification "hump," may be "contaminated" with product residue. The residue may be transferred from such cars to the retarders, which may then lose their full ability to grip car wheels in order to slow them down as they exit the retarders and are guided toward newly forming trains. If the exit speed is too fast, the incoming car may have an over-speed collision with a stationary car that already has joined the train being formed. From data obtained from the website of the FRA, it appears that these over-speed collisions occur only rarely. Attached as Exhibit 10 is a summary of over-speed classification yard events from 2008 through the present, as shown on public FRA reports. Over that time span, there were only 15 such reported events attributable to under-functioning of retarders, or an average of less than five per year.[9]

C. Setting Out Unsafe Cars At Origin or Destination.

UP's tariff draws a distinction between cars that are tendered "unsafe for movement" (Item 200-B(1), and cars set out in an unsafe condition after the car was switched from the spot where it was tendered but while still within the facility where it was loaded or unloaded. (Item 200-B(2).) The charges for a violation of Item 200-B(2) are higher than those for a violation of Item 200-B(1) because the former includes charges for intraplant switching in addition to the $650 penalty.

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[8] See Exhibits 6, 7, and 8. For a brief explanation of classification yard retarders, see Exhibit 9, Verified Statement of Rick Grossman.

[9] See Line M 407, Exhibit 10.

Item 200-B(2) plainly contemplates a prior train movement by UP by stating that its provisions apply "after the car was switched from the spot where it was tendered." Thus, Item 200-B(2) contemplates the prior movement of the subject car in a switching train. Pursuant to FRA rules, 49 C.F.R. § 215.13, when a car is placed in a train, without distinction as to whether the train is a switch train or a road train, the car is to be inspected for any "apparent" safety hazard. 49 C.F.R., Part 215, Appendix D. Not only is UP violating FRA regulations when it fails to inspect a car that is placed in a train, even if a switch train, but it also costing the shipper unnecessary charges in the form of intraplant switch charges that are included in Item 200-B(2), but not in Item 200-B(1).

D. Setting Out Unsafe Cars Enroute.

The problems with Item 200-B(3) are similar to those found in Item 200-B(2) in that UP may, under this paragraph, claim the existence of unsafe conditions enroute that should have been found when the car was first placed in a train by UP. This issue pertains more to product residue claimed to be on the car's wheels than to problems arising from unsecure tank car valves and hatches.

E. No Fault Liability

Perhaps the most invidious provision of Item 200-B is its paragraph (4) which holds consignors, consignees, or agents absolutely responsible for property damage, costs associated with environmental contamination, personal injury, or death attributable to lading leakage or lading residue on the exterior of railcars, including wheels. This assertion of shipper or consignee strict liability is worded so as to apply regardless of any negligent acts or inaction by UP. That interpretation of this subsection is reinforced by the last sentence, which purports to waive UP's inspection duties under the FRA regulations by stating that "UP's acceptance of a rail car that is

later determined to be leaking or to have lading residue on its exterior will in no way relieve the consignor, consignee, or agent of its obligations herein, and shall not constitute a waiver by UP of the consignor's, consignee's, or agent's obligations to tender railcars suitable for safe movement."

It may be that a car that commences to leak during transportation due solely to the fault of the shipper, but UP cannot assume by tariff that any tank car leakage automatically leads to unsafe wheel or retarder conditions. Those should be issues subject to proof. UP wrongfully is exonerating itself from liability if it fails to inspect a car pursuant to FRA regulations or does inspect the car, fails to find that it is unsafe for movement, allows it to proceed, and then automatically places blame for exterior product residue exclusively on the shipper.

F. Shipper Activities at Loading and Unloading Facilities

The grain industry is widely diversified, with grain merchandisers and product producers frequently making purchases of raw materials to be shipped from facilities that they do not control and with shipments going to destinations that the seller does not control. To explain some of the circumstances attendant to the movement of cars within the grain industry, NAFCA has attached as Exhibit 11 the Verified Statement of James Bobitt, Director, North America Rail Operations, for ADM Transportation, Inc., whose parent company, Archer Daniels Midland Company, is a member of NAFCA, and Exhibit 2, the Verified Statement of Gary J. Devlin. A dozen or more similar statements could have been authored by representatives of other NAFCA members, but we saw little point in engaging in duplicative testimony about conditions that obtain industry-wide. The Verified Statements of Mr. Bobitt and Mr. Devlin can be taken as representative of the statements that many other NAFCA members could have produced based on the similar conditions that generally are pervasive in the grain industry.

Traders of grain and grain products often cannot control the conditions that prevail at facilities where they purchase grain or deliver it for sale, essentially because the grain market is so diversified. This situation compounds the unfairness of the UP effort to impose on a consignor the duty of making sure that an empty car received for loading from a prior consignee that this consignor may have no control over is clean for loading before it is loaded. See Exhibit 11. The presentation of "unclean" cars by UP for loading in fact is the rule, rather than the exception, indicating that UP is either not inspecting empties before it places them in a train or is practicing a very low level of inspection. *Id.*

In some instances, ADM does in fact clean empty cars where residue accumulations interfere with the use of the car. *Id.* However, there is little logic to requiring a consignor to clean an inbound empty prior to loading, because that car is bound to accumulate some degree of product residue while it is being loaded. Shippers pay far more attention to the exterior of loaded cars than to the exterior of empty cars. *Id.*

On those rare occasions where the loading of a tank car results in product residue accumulating on the car's exterior or the industry's yard tracks, the tracks are vacuumed or a hand or power wash is used to cleanse the exterior of the car. Shippers have no investment in seeing their products as drippings. See Exhibits 2 and 11.

NAFCA recognizes the significance of safe railroad operating practices and its members make every effort to follow such practices. NAFCA must resist, however, when UP attempts to shift its own safety obligations, and the attendant risks and liability, from itself to its customers.

There is no valid reason why the Board should permit UP to use a tariff as an instrument to eliminate its own possible negligence from consideration where UP alleges that shippers are

responsible for accidents or other mishaps. The law of negligence long has applied to such disputes, and is entirely adequate as a continuing means for their resolution.

Item 200-B is a transparent effort by UP to avoid the consequences when it acts negligently. It is unreasonable for UP to use its tariffs to tilt the scales of liability in its favor by imposing strict duties on its customers and expressly reserving the right to pursue its customers for damages even when UP shirks its duties.

NAFCA asserts that all of the deficiencies in Item 200-B described above are unreasonable practices and unreasonable car services rules, and urges the Board to require cancellation of Item 200-B.

Respectfully submitted,

Andrew P. Goldstein
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McCarthy, Sweeney & Harkaway, P.C.
Suite 700
1825 K Street, N.W.
Washington, DC 20006
(202) 775-5560

Attorneys for
North America Freight Car Association

Dated: December 5. 2011

PUBLIC VERSION

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opening Statement of Fact and Argument has, this 5th day of December 2011 been served, by hand delivery, upon all parties of record.

Andrew P. Goldstein

S:\Med\NAFCA Opening Statement of Fact & Argument

UP 6004-C	**Item:** 200-B EXTERIOR RAILCAR CONTAMINATION

REMOVAL OF LADING RESIDUE FROM EXTERIOR OF RAILCARS AND PREVENTION OF LEAKING BEFORE TENDERING

1. **Tendering Cars Safe for Movement:** Consignor, consignee or agent releasing a loaded or empty railcar for movement on UP's lines shall remove lading residue from the railcar's exterior, including the wheels, brakes, and safety appliances (ladders, handholds, brake handles, catwalks, etc.) and ensure that all valves and discharge ports are properly secured and, if necessary, sealed to prevent leakage during rail movement before tendering the car for movement. If UP rejects the car as unsafe for movement, UP may assess the party that released the car a $650.00 surcharge per car rejected.

2. **Setting Out Unsafe Cars at Origin or Destination:** If UP discovers that the railcar is in an unsafe condition for movement due to the failure to remove lading residue or to properly secure (and seal, if necessary) after the car was switched from the spot where it was tendered but while still within the facility where it was loaded or unloaded, UP will remove the car from the train and set it out for consignor, consignee or agent to clean, secure or seal, as necessary. UP may assess the party that released the car before it was suitable for movement a $650.00 surcharge per car set out for cleaning, securing or sealing. UP may also assess applicable intraplant switch charges as published in UP Tariff 6004-series for removing the car from the train and setting it out.

3. **Setting Out Unsafe Cars Enroute:** If UP discovers that the railcar is in an unsafe condition for movement due to the failure to remove residue or to properly secure (and seal, if necessary) after the car was removed from the facility where it was loaded or unloaded, UP will set out the car and notify the consignor, consignee or agent responsible for releasing or tendering of the car, of the its condition and location. That party will be responsible, at its own cost, for the expenses associated with returning the car to a clean and safe condition, as well as properly disposing of residue or debris resulting from this cleaning, securing or sealing. UP may assess that party a $650.00 surcharge per car set out for cleaning, securing or sealing. UP may also assess applicable switch charges as published in UP Tariff 6004-series for removing the car from the train and returning the car to a train.

4. Assessment and/or payment of the foregoing charges and surcharges will not relieve the consignor, consignee, or agent of its responsibility for any property damage, costs associated with environmental contamination and cleanup, personal injury, or death attributable to lading leakage or lading residue on the exterior of railcars, including wheels, brakes, and safety appliances. UP's acceptance of a railcar that is later determined to be leaking or to have lading residue on its exterior will in no way relieve

Continued on next page

the consignor, consignee, or agent of its obligations herein, and shall not constitute a waiver by UP of the consignor's, consignee's or agent's obligations to tender railcars suitable for safe movement.

VERIFIED STATEMENT

OF

GARY J. DEVLIN

My name is Gary J. Devlin. I am Director, Rail Service, for AGP Inc.. A Cooperative ("AGP"), based in Omaha, NE. AGP, a member of North America Freight Car Association, is a cooperative engaged in the procurement, processing, marketing, and transportation of grain and grain products. AGP processes soybeans into soybean oil, soybean meal and other co-products. AGP also processes corn into ethanol and other co-products, and also handles other grain and grain products. These various commodities and products are shipped by rail, routed via Union Pacific Railroad ("UP"), from our major processing facilities in Iowa, Missouri and Nebraska.

Over the past few years, I have had discussions with UP representatives regarding AGP cars that allegedly have had lading residue on wheels as the cars went through retarders at UP hump yards. UP has informed AGP that its principal purpose in publishing Items 200-A and 200-B was to curtail cars entering the retarder system with lading residue on the wheels. UP contends that the residue amounts to a "contaminant" which will prohibit the retarders from functioning as they should, both for the car supposedly bearing the contaminant and for subsequent cars moving through the retarders. The result of a malfunctioning retarder can be a car proceeding through the classification system at an excessive speed and having an over-speed collision with another car. After discussing pre-classification yard procedures with UP personnel, I do not believe that UP makes any routine effort to inspect car wheels for lading contamination before placing the cars into the hump yard classification process. I have visited several UP classification yards and I am not aware that UP routinely inspects cars for lading contamination on

wheels, except as UP asserts it performs that function before a train departs. Consequently, if UP accepts a car into a train, having passed the requirements of 49 C.F.R. Part 215, it appears that the cars in that train, even if they somehow or somewhere along the line accumulate residue on the wheels, will enter the retarder classification yard process without any additional inspection, and that the first that UP will know that there happened to be residue on the wheels was after the car left the retarder at an excessive speed.

The surcharge in Item 200-B of $650 per car, which is assessed on cars that UP identifies as having exterior contamination, is duplicative, unreasonable and punitive. Item 200-B-2 allows the UP to assess a $650 per car contamination surcharge, plus assess intra-plant switching charges, as published in UP Tariff 6004, if a 'contaminated' car is found still within the facility where it was loaded or unloaded. If such a 'contaminated' car is found, the UP indicates it will simply switch the car from one Industry track to another Industry track and will not move the car out of the facility. The UP performs no additional extra work other than an intra-plant switch. These intra-plant switch charges are already covered under UP's intra-plant switching charge, UP 6004 Item 9065, which currently amounts to $180 per car. It is not reasonable to apply a contamination surcharge, on top of an already established intra-plant switching charge, when no additional work or cleaning of said contaminants is performed by UP.

UP, through the publication of Item 200-B, attempts to transfer liability and risk from the UP to the shipper. Rather than determining the material facts related to a contaminated car found enroute, this new item 200-B-3 automatically determines that the shipper, or an entity other than the UP, is responsible for the unsafe condition of the car. This despite the fact that, per 49 C.F.R Part 215, the UP is required to inspect each car prior to placing it in a train, to make sure that it

does not contain any safety hazard likely to cause an accident prior to the arrival of the train at its destination.

According to Item 200-B, once the UP has determined that the car is in an unsafe condition, sub item 3 provides the mechanism for UP to assess a $650 surcharge against the shipper (or entity releasing the car), plus require the shipper to pay the expenses associated with the UP to return the car to a clean and safe condition, plus disposal, cleaning, set-out and other charges. The language does not allow the party that UP deems responsible for the unsafe condition to determine or investigate the cause of the contamination, nor mitigate any expenses related to 'returning' the car to a clean and safe condition.

VERIFICATION

I hereby certify that the foregoing statements are true and accurate to the best of my belief and knowledge.

Gary J. Devlin

Notary Public

GENERAL NOTARY - State of Nebraska
ANN M. MANN
My Comm. Exp. Nov. 7, 2013

My commission expires Nov. 7, 2013

Section		Violation	Willful
	(c)(1)–(4) Failure to meet requirements for operating on-track roadway maintenance machine with non-complying headlights, work lights, horn, fire extinguisher, alarm, warning light, or beacon	2,500	5,000
	(c)(5) Failure to repair or replace defective or missing operator's seat within required time period	5,000	10,000
214.529	In-service failure of primary braking system	5,000	10,000
214.531	Schedule of repairs; general	2,500	5,000
214.533	Schedule of repairs subject to availability of parts		
	(a)–(c) Failure to order necessary part(s), make repair(s), or remove on-track roadway maintenance machine or hi-rail vehicle from service as required	2,500	5,000
	(d) Failure to maintain record or make record available to FRA	2,000	4,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $27,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

[57 FR 28127, June 24, 1992, as amended at 61 FR 65961, Dec. 16, 1996; 63 FR 11620, Mar. 10, 1998; 68 FR 44412, July 28, 2003; 69 FR 8639, Feb. 26, 2004; 69 FR 30593, May 28, 2004]

PART 215—RAILROAD FREIGHT CAR SAFETY STANDARDS

Subpart A—General

Subpart B—Freight Car Components

Subpart C—Restricted Equipment

Subpart D—Stenciling

AUTHORITY: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; and 49 CFR 1.49.

SOURCE: 44 FR 77340, Dec. 31, 1979, unless otherwise noted.

Subpart A—General

§215.1 Scope of part.

This part prescribes minimum Federal safety standards for railroad freight cars.

§215.3 Application.

(a) Except as provided in paragraphs (b) and (c) of this section, this part applies to each railroad freight car in service on:

(1) Standard gage track of a railroad; or

(2) Any other standard gage track while the car is being operated by, or is otherwise under the control of, a railroad.

(b) Sections 215.15 and 215.303 of this part do not apply to any car:

(1) Owned by a Canadian or Mexican Railroad; and

(2) Having a Canadian or Mexican reporting mark and car number.

(c) This part does not apply to a railroad freight car that is:

(1) Operated solely on track inside an industrial or other non-railroad installation; or

(2) Used exclusively in dedicated service as defined in §215.5(d) of this part; or

(3) Maintenance-of-way equipment (including self-propelled maintenance-of-way equipment) if that equipment is not used in revenue service and is stenciled in accordance with §215.305 of this part.

(4) Operated in a passenger train and that is inspected, tested, maintained, and operated pursuant to the requirements contained in part 238 of this chapter.

[44 FR 77340, Dec. 31, 1979, as amended at 65 FR 41308, July 3, 2000]

§215.5 Definitions.

As used in this part:

(a) *Break* means a fracture resulting in complete separation into parts;

(b) *Cracked* means fractured without complete separation into parts, except that castings with shrinkage cracks or hot tears that do not significantly diminish the strength of the member are not considered to be "cracked";

(c) *Railroad freight car* means a car designed to carry freight, or railroad personnel, by rail and includes a:

(1) Box car;
(2) Refrigerator car;
(3) Ventilator car;
(4) Stock car;
(5) Gondola car;
(6) Hopper car;
(7) Flat car;
(8) Special car;
(9) Caboose car;
(10) Tank car; and
(11) Yard car.

(d) *Dedicated service* means the exclusive assignment of cars to the transportation of freight between specified points under the following conditions:

(1) The cars are operated—

(i) Primarily on track that is inside an industrial or other non-railroad installation; and

(ii) Only occasionally over track of a railroad;

(2) The cars are not operated—

(i) At speeds of more than 15 miles per hour; and

(ii) Over track of a railroad—

(A) For more than 30 miles in one direction; or

(B) On a round trip of more than 60 miles;

(3) The cars are not freely interchanged among railroads;

(4) The words "Dedicated Service" are stenciled, or otherwise displayed, in clearly legible letters on each side of the car body;

(5) The cars have been examined and found safe to operate in dedicated service; and

(6) The railroad must—

(i) Notify the FRA in writing that the cars are to be operated in dedicated service;

(ii) Identify in that notice—

(A) The railroads affected;

(B) The number and type of cars involved;

(C) The commodities being carried; and

(D) The territorial and speed limits within which the cars will be operated; and

(iii) File the notice required by this paragraph not less than 30 days before the cars operate in dedicated service;

(e) *In service* when used in connection with a railroad freight car, means each railroad freight car subject to this part unless the car:

(1) Has a "bad order" or "home shop for repairs" tag or card containing the prescribed information attached to each side of the car and is being handled in accordance with §215.9 of this part;

(2) Is in a repair shop or on a repair track;

(3) Is on a storage track and is empty; or

(4) Has been delivered in interchange but has not been accepted by the receiving carrier.

(f) *Railroad* means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, and (2) high speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations

made only for the purpose of effecting repairs. If the car is empty, it may not be placed for loading. If the car is loaded, it may not be placed for unloading unless unloading is consistent with determinations made and restrictions imposed under paragraph (a)(1) of this section and—

(1) The car is consigned for a destination on the line of haul between the point where the car was found defective and the point where repairs are made; or

(2) Unloading is necessary for the safe repair of the car.

(d) Nothing in this section authorizes the movement of a freight car subject to a Special Notice for Repairs unless the movement is made in accordance with the restrictions contained in the Special Notice.

[44 FR 77360, Dec. 31, 1979; 48 FR 26710, Apr. 21, 1980]

§215.11 Designated inspectors.

(a) Each railroad that operates railroad freight cars to which this part applies shall designate persons qualified to inspect railroad freight cars for compliance with this part and to make the determinations required by §215.9 of this part.

(b) Each person designated under this section shall have demonstrated to the railroad a knowledge and ability to inspect railroad freight cars for compliance with the requirements of this part and to make the determinations required by §215.9 of this part.

(c) With respect to designations under this section, each railroad shall maintain written records of:

(1) Each designation in effect; and

(2) The basis for each designation.

[48 FR 26710, Apr. 21, 1980]

§215.13 Pre-departure inspection.

(a) At each location where a freight car is placed in a train, the freight car shall be inspected before the train departs. This inspection may be made before or after the car is placed in the train.

(b) At a location where an inspector designated under §215.11 is on duty for the purpose of inspecting freight cars, the inspection required by paragraph (a) of this section shall be made by that inspector to determine whether the car is in compliance with this part.

(c) At a location where a person designated under §215.11 is not on duty for the purpose of inspecting freight cars, the inspection required by paragraph (a) shall, as a minimum, be made for those conditions set forth in appendix D to this part.

(d) Performance of the inspection prescribed by this section does not relieve a railroad of its liability under §215.7 for failure to comply with any other provision of this part.

[48 FR 26710, Apr. 21, 1980]

§215.15 Periodic inspection.

(a) After June 30, 1980, a railroad may not place or continue in service a freight car that has not received an initial periodic inspection in accordance with 49 CFR 215.25, as in effect on October 6, 1976 (41 FR 44044), unless—

(1) The car is a high utilization car built or reconditioned after December 31, 1977; or

(2) The car is a non-high utilization car built or reconditioned after December 31, 1971.

(b) A freight car that has received an initial periodic inspection under paragraph (a) of this section shall be stenciled to so indicate in accordance with 49 CFR 215.11 and appendix C of this part, as in effect on October 6, 1976 (41 FR 44044). This stenciling need not be retained on the car after June 30, 1981.

(c) As used in this section, "high utilization car" means a car—

(1) Specifically equipped to carry trucks, automobiles, containers, trailers, or removable trailer bodies for the transportation of freight; or

(2) Assigned to a train that operates in a continuous round trip cycle between the same two points.

Subpart B—Freight Car Components

§215.101 Scope.

This subpart contains safety requirements prohibiting a railroad from placing or continuing in service a freight car that has certain defective components.

(1) Any portion missing;
(2) Broken or cracked as defined in this part.
(F) Broken side sills, crossbars or body bolster.
§ 218.129 Defective couplers.
(A) Coupler shank bent.
(B) Coupler cracked in highly-stressed area of head and shank.
(C) Coupler knuckle broken.
(D) Coupler knuckle pin or knuckle throw:
(1) Missing;
(2) Inoperative.
(E) Coupler retainer pin lock:
(1) Missing;
(2) Broken.
(F)(1) Coupler lock(s) is inoperative.
(2) No anti-creep protection.
(3) Coupler lock is (i) missing, (ii) inoperative, (iii) bent, (iv) cracked, or (v) broken.
§ 218.131 Defective uncoupling device.
(A) Fouling on curve.
(B) Unintentional uncoupling.
§ 218.137 Defective draft arrangement.
(A) Draft gear inoperative.
(B) Broken yoke.
(C) End of car cushioning unit:
(1) Leaking;
(2) Inoperative.
(D) Vertical coupler pin retainer plate:
(1) Missing;
(2) Has missing fasteners.
(E) Draft key or key retainer:
(1) Inoperative;
(2) Missing.
(F) Follower plate missing or broken.
§ 218.139 Defective cushioning device unless effectively immobilized.
(A) Broken.
(B) Inoperative.
(C) Missing parts.
§ 218.305 Operating a restricted car, except under conditions approved by FRA.

Stenciling

§ 218.307 Failure to stencil car number and built date on freight car as required.
§ 218.309 Failure to stencil restricted car as required.
§ 218.310 Failure to stencil maintenance-of-way equipment as required.

APPENDIX D TO PART 218—PRE-DEPARTURE INSPECTION PROCEDURE

At each location where a freight car is placed in a train and a person designated under § 218.11 is not on duty for the purpose of inspecting freight cars, the freight car shall, as a minimum, be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination. These conditions are readily discoverable by a train crew member in the course of a customary inspection.

1. Car body:
(a) Leaning or listing to side.
(b) Sagging downward.
(c) Positioned improperly on trunk.
(d) Object dragging below.
(e) Object attending from side.
(f) Door insecurely attached.
(g) Broken or missing safety appliance.
(h) Leaking, leaking from a placarded hazardous material car.
2. Insecure coupling.
3. Overheated wheel or journal.
4. Broken or extensively cracked wheel.
5. Brake that fails to release.
6. Any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination.

[61 FR 30711, June 17, 1996]

PART 216—SPECIAL NOTICE AND EMERGENCY ORDER PROCEDURES; RAILROAD TRACK, LOCOMOTIVE AND EQUIPMENT

Subpart A—General

Subpart B—Special Notice for Repairs

Subpart C—Emergency Order—Track

AUTHORITY: 49 U.S.C. 20102–20104, 20107, 20111, 20133, 20701–20702, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

SOURCE: 41 FR [illegible], May 4, 1976, unless otherwise noted.

Subpart A—General

§ 216.1 Application.

(a) This part applies, according to its terms, to each railroad that uses or operates—

(1) Any portion missing;
(2) Broken or cracked as defined in this part.
(F) Broken side sills, crossbars or body bolster.
215.125 Defective couplers.
(A) Coupler shank bent.
(B) Coupler cracked in highly stressed area of head and shank.
(C) Coupler knuckle broken.
(D) Coupler knuckle pin or knuckle throw:
(1) Missing;
(2) Inoperative.
(E) Coupler retainer pin lock:
(1) Missing;
(2) Broken.
(F)(1) Coupler locklift is inoperative;
(2) No anti-creep protection;
(3) Coupler lock is (i) missing, (ii) inoperative, (iii) bent, (iv) cracked or (v) broken.
215.126 Defective uncoupling device.
(A) Fouling on curve.
(B) Unintentional uncoupling.
215.127 Defective draft arrangement.
(A) Draft gear inoperative.
(B) Broken yoke.
(C) End of car cushioning unit:
(1) Leaking;
(2) Inoperative.
(D) Vertical coupler pin retainer plate:
(1) Missing;
(2) Has missing fastener.
(E) Draft key or key retainer:
(1) Inoperative;
(2) Missing.
(F) Follower plate missing or broken.
215.128 Defective cushioning device unless effectively immobilized.
(A) Broken.
(B) Inoperative.
(C) Missing parts.
215.203 Operating a restricted car, except under conditions approved by FRA.

Stenciling

215.301 Failure to stencil car number and built date on freight car as required.
215.302 Failure to stencil restricted car as required.
215.305 Failure to stencil maintenance-of-way equipment as required.

Appendix D to Part 215—Pre-Departure Inspection Procedure

At each location where a freight car is placed in a train and a person designated under §215.11 is not on duty for the purpose of inspecting freight cars, the freight car shall, as a minimum, be inspected for the imminently hazardous conditions listed below that are likely to cause an accident or casualty before the train arrives at its destination. These conditions are readily discoverable by a train crew member in the course of a customary inspection.

1. Car body:
(a) Leaning or listing to side.
(b) Sagging downward.
(c) Positioned improperly on truck.
(d) Object dragging below.
(e) Object extending from side.
(f) Door insecurely attached.
(g) Broken or missing safety appliance.
(h) Leading leaking from a placarded hazardous material car.
2. Insecure coupling.
3. Overheated wheel or journal.
4. Broken or extensively cracked wheel.
5. Brake that fails to release.
6. Any other apparent safety hazard likely to cause an accident or casualty before the train arrives at its destination.

[45 FR 26711, Apr. 21, 1980]

PART 216—SPECIAL NOTICE AND EMERGENCY ORDER PROCEDURES: RAILROAD TRACK, LOCOMOTIVE AND EQUIPMENT

Subpart A—General

Sec.
216.1 Application.
216.3 Definitions.
216.5 Delegation and general provisions.
216.7 Penalties.

Subpart B—Special Notice for Repairs

216.11 Special notice for repairs—railroad freight car.
216.13 Special notice for repairs—locomotive.
216.14 Special notice for repairs—passenger equipment.
216.15 Special notice for repairs—track class.
216.17 Appeals.

Subpart C—Emergency Order—Track

216.21 Notice of track conditions.
216.23 Consideration of recommendation.
216.25 Issuance and review of emergency order.
216.27 Reservation of authority and discretion.

Authority: 49 U.S.C. 20102-20104, 20107, 20111, 20133, 20701-20702, 21301-21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Source: 41 FR 18657, May 6, 1976, unless otherwise noted.

Subpart A—General

§216.1 Application.

(a) This part applies, according to its terms, to each railroad that uses or operates—

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

(Redacted)

VERIFIED STATEMENT

OF

RICK GROSSMAN

My name is Rick Grossman. I am Vice President – Equipment for First Union Rail ("FUR"), a Wells Fargo company. I have been employed by FUR since 1995 and previously was employed by a Class I Railroad, Chicago & North Western, which was merged into Union Pacific Railroad. I am familiar with the operations of railroad classification yards, sometimes known as "hump" yards.

The purpose of this statement is to explain the operations of hump yard retarders. Retarders are devices that are designed to control the speed at which cars roll by gravity into the classification tracks of the hump yard. The hump yard facility, which generally is computerized, moves strings of incoming cars to a point where they become subject to gravity distribution to various classification tracks which then are made up into outgoing trains. Depending on the weight of the car and the distance it must travel to its new train, the retarders in the classification yard grip the rims of the incoming wheels of the cars to control the speed at which they leave the retarder point for their classification track. Other retarders along the route into the classification track may also control the car and its continuing speed. If there is a foreign matter on the retarder, perhaps left there by a prior car with lading residue on the rim of the wheels, the retarder may not work as effectively and the outgoing car may travel at an excessive speed into its classification track.

VERIFICATION

I hereby certify that the foregoing statements are true and accurate to the best of my belief and knowledge.

Rick Grossman

OFFICIAL SEAL
K. A. DOMBROWSKI
Notary Public - State of Illinois
My Commission Expires Oct 07, 2013

Notary Public

My commission expires 10-7-2013.

Federal Railroad Administration
Office of Safety Analysis

3.10 - Accident Causes

TRAIN ACCIDENTS BY CAUSE FROM FORM FRA F 6180.54

MAJOR CAUSE= Equipment

Selections: Railroad - Union Pacific RR Co. [UP]
State - ALL, County - ALL
Other Impacts / YARD / ALL CAUSES
Time Frame: Jan 2008 To Aug 2011

Specific causes:	Total Cnt	%	Type of Accident Othr	Reportable Damage Amount	%	Casualty Kld	Nonf
E06C- Brake valve malf. (stuck brake, etc.)	10.6		1	213,674	3.2	0	0
E09C- Other brake defects, cars	10.6		1	49,819	0.7	0	0
E0HC- Hnd brk link and/or connect defect	10.6		1	31,664	0.5	0	0
E29C- Other body defects, (CAR)	10.6		1	24,009	0.4	0	0
E30C- Knuckle broken or defective	42.3		4	137,065	2.0	0	0
E79L- Other LOCO defects	10.6		1	117,201	1.7	0	0
-- Total	95.1		9	573,432	8.5	0	0

MAJOR CAUSE= Human

Selections: Railroad - Union Pacific RR Co. [UP]
State - ALL, County - ALL
Other Impacts / YARD / ALL CAUSES
Time Frame: Jan 2008 To Aug 2011

Specific causes:	Total Cnt	%	Type of Accident Othr	Reportable Damage Amount	%	Casualty Kld	Nonf
H008- Bottling the Air	1	0.6	1	9,276	0.1	0	0
H017- Failure to secure engine- rr empl	1	0.6	1	17,433	0.3	0	0
H018- Fail to secure car hnd brk -rr emp	3	1.7	3	36,809	0 5	0	0
H020- Fail to apply suff. hand brakes -rr emp	6	3.4	6	103,154	1.5	0	0
H021- Fail to apply car hnd brks -rr emp	4	2.3	4	179,502	2.6	0	0
H212- Radio comm., failure to give/receive	2	1.1	2	43,926	0 6	0	0
H302- Cars left foul	6	3.4	6	179,518	2 6	0	0
H305- Instruction to trn/yd crew improper	2	1.1	2	88,224	1.3	0	0
H306- Shoving movement, absence of man	16	9.1	16	1,249,437	18.4	0	0
H307- Shoving movement, failure to control	7	4.0	7	248,534	3.7	0	1
H309- Failure to stretch cars before shoving	1	0.6	1	18,848	0.3	0	0
H310- Failure to couple	4	2.3	4	107,348	1.6	0	0
H312- Passed couplers	7	4.0	7	238,785	3.5	0	0
H313- Retarder, improper manual operation	3	1.7	3	81,134	1.2	0	0
H316- Manual intervention of classification yar	1	0.6	1	14,240	0.2	0	0
H317- Humping or cutting off in motion equipmen	1	0.6	1	118,626	1.7	0	0
H318- Kicking or dropping cars, inadequate prec	8	4.6	8	281,316	4.1	0	0
H399- Other general switching rules	3	1.7	3	52,838	0.8	0	0
H402- Motor car/on-trk rules, fail to comply	1	0.6	1	28,300	0.4	0	0
H601- Coupling speed excessive	3	1.7	3	122,144	1.8	0	0
H602- Switch movement, excessive speed	2	1.1	2	39,538	0.6	0	0
H605- Failure to comply with restricted speed	1	0.6	1	16,456	0.2	0	0
H607- Failure to comply with restricted speed o	1	0.6	1	17,500	0.3	0	0
H701- Spring Swtch not clear before reverse	1	0.6	1	23,642	0.3	0	0
H702- Switch improperly lined	7	4.0	7	245,481	3.6	0	0
H704- Switch previously run through	1	0.6	1	34,463	0.5	0	0
-- Total	93	53.1	93	3,596,472	53.1	0	1

MAJOR CAUSE= Miscellaneous

Selections: Railroad - Union Pacific RR Co. [UP]
State - ALL, County - ALL
Other Impacts / YARD / ALL CAUSES
Time Frame: Jan 2008 To Aug 2011

Specific causes:	Total Cnt	%	Type of Accident Othr	Reportable Damage Amount	%	Casualty Kld	Nonf
M105- Extreme wind velocity	2	1.1	2	32,914	0.5	0	0
M405- Harmonic rock off, etc.	1	0.6	1	11,829	0.2	0	0
M407- Auto hump retarder failed to slow car	15	8.6	15	596,330	8 8	0	0
M408- Yard skate slid and failed to stop car	2	1.1	2	39,826	0.6	0	0
M411- Passed couplers (automated classification	29	16.6	29	772,628	11.4	0	0
M504- Fail by non-rr empto control spd of car	2	1.1	2	260,648	3.8	0	0
-- Total	51	29.1	51	1,714,175	25.3	0	0

MAJOR CAUSE= Signal

Selections: Railroad - Union Pacific RR Co. [UP]
State - ALL, County - ALL
Other Impacts / YARD / ALL CAUSES
Time Frame: Jan 2008 To Aug 2011

Specific causes:	Total Cnt	%	Type of Accident Othr	Reportable Damage Amount	%	Casualty Kld	Nonf
S006- Classyard autocontrol sys switch fail	2	1.1	2	49,175	0.7	0	0
S007- Class yd auto ctrl sys retarder fail	12	6.9	12	303,486	4 5	0	0
S011- Power switch failure	1	0.6	1	10,463	0.2	0	0
S013- Other communication equipment failure	1	0.6	1	40,816	0.6	0	0
S016- Classification yard automatic control sys	2	1.1	2	77,274	1.1	0	0
-- Total	18	10.3	18	481,214	7 1	0	0

MAJOR CAUSE= Track

Selections: Railroad - Union Pacific RR Co. [UP]
State - ALL, County - ALL
Other Impacts / YARD / ALL CAUSES
Time Frame: Jan 2008 To Aug 2011

Specific causes:	Total Cnt	%	Type of Accident Othr	Reportable Damage Amount	%	Casualty Kld	Nonf
T102- Cross level track irreg.(not at joints)	1	0.6	1	377,754	5 6	0	0
T305- Retarder worn, broken, malfunctioning	2	1.1	2	23,256	0.3	0	0
T403- Engineering design or construction	1	0.6	1	12,740	0.2	0	0
-- Total	4	2.3	4	413,750	6.1	0	0

VERIFIED STATEMENT

OF

JAMES BOBITT

My name is James Bobitt. I am Director, North American Rail Operations, for ADM Transportation, Inc. ("ADM"), a subsidiary of Archer Daniels Midland Company. ADM is a member of North America Freight Car Association. It is a merchandiser of grain and grain products and a producer of various other commodities, such as ethanol, soybean oil, and corn oil.

I am aware of the pending proceeding in Docket No. 42119, *North America Freight Car Association v. Union Pacific Railroad Company*, and the issues involved in that proceeding; namely, under what circumstances should a shipper or receiver be held responsible for product residue on certain exterior car parts, including wheels in particular. Union Pacific claims that the fault lies either with sloppy loading procedures for tank cars, resulting in product remaining on the side of the car when the car is tendered to UP for transportation, with improperly tightened tank car dome covers, or with accumulations of product oil on the track areas through which car wheels pass. In discussions with ADM, UP has expressed concern that tank cars leaving our facilities with product residue on the wheels will "contaminate" the retarder devices in UP classification yards, causing the retarders to exert less force on the wheels than planned, and resulting in over-speed exits of cars from retarders, moving downhill possibly toward other cars.

Because ADM buys grain from a great many facilities that we do not control, and sells grain delivered to many facilities that ADM likewise does not control, ADM has nothing to do with the loading and unloading practices at those facilities. Judging from the condition of covered hopper cars, both privately and carrier-owned, that ADM receives for loading at its various

facilities, it is clear to me that only a minority of those cars are cleaned of excess lading residue before they are placed for loading by UP. UP takes the position, in Item 200-B of its Tariff 6004-C, that the consignor is responsible for removing lading residue and other "unsafe" exterior adherents from each car before loading. However, if UP applied its own rules, and those of the Federal Railroad Administration, UP would stop unclean and potentially unsafe cars from leaving unloading points with accumulations of product residue, especially on covered hopper cars. The fact that we receive so many empty cars with varying degrees of that residue tells me that UP is either not inspecting empties before it places them in a train or is practicing a very low level of inspection. In my opinion, it should not be the task of ADM to clean empty cars of lading residue that UP should have caught at the unloading point.

ADM believes that it is the carrier's responsibility to provide a clean, safe car suitable for its intended use. If we rejected every car tendered to us by UP for loading with prior lading residue on the car, we would have virtually no cars left to load and our operations would grind to a standstill. Where cars have such severe accumulations of product residue as, in our judgment, to add weight to the car or interfere with the operation of moving parts such as hatches and outlet gates, ADM washes the car itself because it is far more expeditious to do so than to reject it to UP, which would be our right.

Moreover, there is little logic to requiring cleaning of an inbound empty for the reason that the car is bound to accumulate some degree of product residue while it is being loaded. It's sort of like making the child take a bath before you let him go out and play in the mud. When we load a car, and in particular a tank car, we pay far more attention to its exterior condition than we do when the car was an empty awaiting loading.

Tank cars are subject to very specific loading rules promulgated by the FRA. Manway bolts must be tightened by hand with a 36-inch wrench. Outlet valves must be tested for leaks. ADM follows all of these procedures, and keeps a record of each car loaded on which the loader affirmatively indicates that all necessary steps have been followed. If liquid is observed on the side of the car or the wheels after loading, it is removed by hand or by power wash, depending on the circumstances.

Due to testing of outlet valves on tank cars, occasional malfunctions of those valves, and product that may drip on the side of the car as the loading boom is swung away from the man-way hatch, there are occasions when pools of liquid containing product residue form around our yard tracks and pose a potential source of wheel contamination. Attached is a sample Tank Car Inspection Report used by ADM personnel loading tank cars to make sure all required steps are taken. Our yards are inspected daily for such conditions, and vacuumed clean of any visible liq-uid pools.

ADM tenders its cars to UP in clean, safe condition. Cars are inspected for exterior product residue and washed by hand or power hose if necessary.

VERIFICATION

I hereby certify that the foregoing statements are true and accurate to the best of my belief and knowledge.

James Bobitt

"OFFICIAL SEAL"
REBECCA J MOORE
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 05/29/2013

Notary Public

My commission expires 05/29/2013.

DECATUR EAST REFINERY
TANK CAR INSPECTION REPORT

Date:_____

Car Number_____

Type of Product Loaded _____

Preload Inspection

1. Was valve in good working condition with a sealable cover? _____ YES/NO
2. Did dome lid have a gasket, and was gasket in good condition? _____ YES/NO
3. Can the dome lid be properly sealed? _____ YES/NO
4. Was the car internally inspected? _____ YES/NO
5. Was car free of odors and clean? _____ YES/NO
6. Are the bottom caps off for loading? _____ YES/NO
7. Was empty car sealed? _____ YES/NO

Comments: _____

Loading Inspection

7. Pressure reading on filter pressure gauge? _____ PSIG
8. Nitrogen sparge confirmation _____ YES/NO

Post-Load Inspection

9. After loading were all caps put on car? _____ YES/NO
10. After loading, was the car closed up and sealed properly? _____ YES/NO
11. Was car pressurized to 25 psig with nitrogen? _____ YES/NO
    a. Was the % of oxygen reading below 3%? _____ YES/NO
12. Was car repressurized to 25 psig final and pressure hold? _____ YES/NO
13. Is tank car exterior clean? _____ YES/NO
14. Seal numbers: _____
15. Weather conditions: RAINING SNOWING CLEAR

Comments: _____

Signed _____